Filed 5/19/09 P. v. Peoples CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH PEOPLES et al., Defendant and Appellant.	B202960 (Los Angeles County Super. Ct. No. BA277127)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lance A. Ito, Judge. Affirmed.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant Kenneth Peoples.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant Eric Butler.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendants and appellants Kenneth Peoples and Eric Butler guilty of special circumstance felony murder and of robbery. Defendant Peoples moved to sever his trial from Butler's trial. The trial court denied the motion, and at their joint trial, the court admitted Butler's statement implicating himself and Peoples in the crimes. Butler did not testify, and therefore was not subject to cross-examination. On appeal, Peoples contends that admission of Butler's statement violated his Sixth Amendment confrontation rights. He and Butler also contend that their trial counsel provided ineffective assistance of counsel because they failed to object, under Evidence Code section 1101, to criminal disposition evidence. Butler raises the additional contention that the court erred by refusing to limit a flight instruction to Peoples. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

Jae Yang was murdered on December 18, 2004 while working at St. Regis Liquor Store. The morning before his murder, Letoya Robinson, Robert Arceneaux, Tequita Lee and defendants (Peoples and Butler) were at a friend's house.[1] Peoples and Butler are half-brothers. Robinson heard defendants say they needed money. To get money, Peoples and Butler said they sold drugs and "hit licks," meaning they commit robberies.[2] Robinson told defendants that to get money she cashed fake checks at St. Regis Liquor Store. She advised defendants that the cashier did not get the money from the cash register; he got it from somewhere to his left. Defendants left and returned about 30 minutes later.

---

[1] Robinson and Arceneaux have a child together. Both were charged in this case, but they were not tried with defendants. Robinson entered into a plea bargain and was sentenced to two years for robbery. The record indicates that Arceneaux was sentenced to 11 years in prison.

[2] Defense counsel for Peoples objected to this testimony on the ground it was hearsay. The trial court overruled the objection.

Video surveillance of St. Regis Liquor Store from December 17, 2004, shows a man identified as Butler in the store at about 10:00 a.m. Butler did not buy anything. Instead, he asked Yang if he had an ATM.[3] Later that day, around noon, Robinson, Arceneaux and Lee drove to the liquor store. Defendants drove separately in a white, four-door Malibu. Robinson and Lee went into the store, and Robinson asked the cashier if he was cashing checks that day. While Robinson was in the store, defendants entered.[4] The two groups (Robinson/Lee and Peoples/Butler) did not acknowledge each other. Butler bought a few items. Peoples stayed to the rear of the store and his right hand had a white bandage on it.[5] Robinson and Lee left the store.

The next morning, December 18, 2004, Romer Alcala was at the St. Regis Liquor Store. A white Chevy Malibu four-door car was parked outside. Two men were inside the car. While Alcala was in the store, the two men came in.[6] One man shouted, " 'Give me the money.' " Jae Yang tried to fight them, but he was shot. While the men were going through the cash box, one of them said, " 'Man, we messed up.' " Alcala assumed the men were Hispanics because he saw brown skin and he thought they spoke in broken English.

Jorge Dieguez was also in the store when two men wearing ski masks ran into the store through the back entrance. He saw one gun. Dieguez ducked when the shooting started. He did not think the men were Hispanics.

---

[3] Detective Barry Telis, an investigating officer, testified that this is what he could hear on the tape.

[4] Video surveillance of defendants in the store at 12:22 p.m. was also introduced into evidence.

[5] The parties stipulated that Peoples's right hand was shot on December 7, 2004, about 10 days before Yang's murder.

[6] Alcala's testimony was unclear as to whether one or both men had guns.

Later that day, Arceneaux and Robinson went to the St. Regis Liquor Store because Robinson wanted to cash a check. They couldn't enter the store because it had been cordoned off. Jae Yang had been shot and killed. Arceneaux and Robinson left and met Butler outside a friend's apartment. Arceneaux asked Butler what had happened. Butler said he and Peoples had robbed the liquor store, and Butler had killed the cashier. They took money from the cash register, but it wasn't much, under $100. Butler said he had looked for money in a box, but it wouldn't come loose.

Video surveillance of the shooting shows two men wearing hooded sweatshirts enter the store. One man wore light gray sweatpants with two rows of blue stripes down the side. Their faces were covered. One man held a semiautomatic gun. Two black hooded sweatshirts were found at defendants' home.

On January 13, 2005, Butler was arrested as he was driving away from his residence. Butler's girlfriend, Corvette Courtenay, was also arrested that day. She was arrested wearing gray sweats with two blue stripes down the side.

On January 14, 2005, Peoples asked his girlfriend, Candice Hammick, to drive him to the bus station. Peoples told Hammick he'd " 'made a mistake. I messed up. I did a robbery, and the man died.' "[7] Peoples was arrested in Sacramento on February 13.

II. Procedural background.

On March 8, 2007, the jury found defendants guilty of count 1, felony murder (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17))[8] and of count 2, robbery (§ 211). The jury found gun allegations (§ 12022.53, subdivision (d)) true as to both counts.

The trial court sentenced defendants on October 12, 2007. On count 1, the court sentenced both defendants to life without the possibility of parole, plus a consecutive 25 years under section 12022.53, subdivision (d). The court sentenced Peoples to an additional five-year term on count 2. The court sentenced Butler to an additional

---

[7] At trial, Hammick said she didn't remember this conversation with Peoples.

[8] All further undesignated statutory references are to the Penal Code.

midterm of three years on count 2. The sentences on count 2, however, were stayed under section 654.

DISCUSSION

I. *Aranda/Bruton*.

The trial court denied Peoples's motion to sever his case from Butler's. Peoples now contends that the ruling violates the principles in the *Aranda/Bruton*[9] line of cases. We disagree.

A. *Additional facts.*

Peoples moved to sever his trial from Butler's trial.[10] The prosecutor countered with a motion to introduce statements Butler made to Arceneaux in Robinson's presence implicating himself and Peoples in the crime. The trial court ruled: "[T]he statement in question was not testimonial in nature. It was in fact made to a co-conspirator, somebody who had participated in the discussions of the robbery over the past two days. It didn't shift the blame. The statement admits equal culpability as an aider and abettor and as a co-conspirator and as a person liable for the discharge of a firearm. It is an admission as to the declarant and it is also a spontaneous declaration. [¶] And also, an additional theory of admissibility would be the statement of a co-conspirator since the discussion involved the actual distribution of the funds and proceeds of the robbery, the robbery arguably not being completed until disbursement among the persons who had conspired to commit the robbery."

---

[9] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123. Proposition 8 abrogated *Aranda* to the extent it excludes more evidence than does *Bruton*. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

[10] The written motion requested a severance of Peoples's trial from Arceneaux's and Robinson's trial. After Robinson, and apparently Arceneaux, pled guilty, the trial court treated the motion as one to sever Peoples's trial from Butler's trial.

At trial, Letoya Robinson testified that the day of the shooting she and Robert Arceneax saw Butler, who was alone:

"[Robinson]: Robert asked them [*sic*] what happened because he went up to the liquor store, and he told him what he had seen, and he told him – Eric told him that him and Kenny went up to the store, and they robbed it and they shot the guy and they left. [¶] . . . [¶]

"Q. . . . What did Eric say in terms of what actually happened during the robbery?

"A. He said—

"[Peoples's counsel]: Objection. Hearsay.

"The court: Overruled.

"The witness: He said that they entered the back of the liquor store. They ran in, and I guess they demanded money –

"Mr. Shannon [Peoples's counsel]: I'm going to object to 'I guess' because this seems to be speculation on the part of the witness.

"The court: Sustained. [¶] . . . [¶]

"Q. . . . You said that he said they ran in. And then what else did he say?

"A. They demanded money, and the owner put up a fight and grabbed Kenny, and Eric said he shot the guy, they grabbed the money out the register and they ran out the back door.

"Q. Okay. [¶] Did they – Did Eric tell you what he and Kenny were wearing?

"A. No.

"Q. Did he tell you anything about wearing masks or disguising themselves in any way?

"A. No.

"Mr. Shannon: Objection on the ground of leading. Withdraw the objection. [¶] . . . [¶]

"Q. . . . Did Eric tell you why they shot the man?

"A. He said –

"Mr. Shannon: Objection. Hearsay.

"The court: Noted. Overruled.

"The witness: He said because he grabbed Kenny.

"Q. . . . Did he tell you how much money they got?

"Mr. Shannon: Objection. Hearsay.

"The court: Noted. Overruled.

"The witness: No. He just said they grabbed the money out [of] the register. . . ." Robinson later clarified that Butler said he was the shooter.

Butler did not testify and was therefore not subject to cross-examination.

B. *Peoples's confrontation rights were not violated by the admission of Butler's statement.*

The Sixth Amendment to the federal Constitution guarantees a criminal defendant's right to confront the witnesses against him. (U.S. Const., Sixth Amend.) " 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' [Citation.] When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant 'to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth." ' [Citation.]" (*Lilly v. Virginia* (1999) 527 U.S. 116, 123-124, fn. omitted.)

With respect to the specific instance of admitting a nontestifying *codefendant's* confession at a joint trial, *Bruton v. United States, supra,* 391 U.S. 123, and its progeny govern the admission of such a confession or statement. *Bruton* held that a defendant's Sixth Amendment confrontation rights are violated by the admission of a nontestifying codefendant's confession that implicates the defendant, even if the jury is given a limiting instruction to disregard the confession when determining the nondeclarant defendant's guilt or innocence. (*Id.* at pp. 135-136; *Richardson v. Marsh* (1987) 481 U.S. 200, 201-

202; *People v. Fletcher, supra,* 13 Cal.4th at pp. 460-461.)[11] *Bruton* has been interpreted, however, not to stand for the wholesale proposition that "all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 332 (*Greenberger*).)

Greenberger explained that a codefendant's statements inculpating a nondeclarant defendant may be admissible against the nondeclarant defendant if the statements fall within a hearsay exception, and the statements' reliability is shown. *Greenberger* concluded that "a declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness." (*Greenberger, supra,* 58 Cal.App.4th at p. 334; see also *Lilly v. Virginia, supra,* 527 U.S. at p. 136 ["When a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,' the Sixth Amendment's residual 'trustworthiness' test allows the admission of the declarant's statements" (plur. opn.)].) To make this determination, the trial court must look at the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the declarant's possible motivation, what the declarant actually said, and anything else relevant to the inquiry. (*Greenberger,* at p. 334.)[12]

---

[11] To avoid a confrontation clause problem, a confession or statement can be redacted to omit reference to the defendant, in some circumstances. (*Richardson v. Marsh, supra,* 481 U.S. at pp. 208-209, 211.)

[12] We note that *Greenberger* relied on *Ohio v. Roberts* (1980) 448 U.S. 56. *Roberts,* which did not involve admission of a nontestifying codefendant's statement against the defendant, held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (*Roberts,* at p. 66.)

We relied on *Greenberger* in *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*). In *Cervantes*, defendant Morales told his friend, Dolores Ojeda, a medical assistant, he was injured jumping fences after he, Martinez and Cervantes detained two men and shot them. Morales said he shot one of the men, and he and Cervantes shot the second man. (*Id.* at p. 166-167.) At trial, Morales's statement was introduced through Ojeda against Cervantes and Martinez. Morales did not testify and was therefore not subject to cross-examination.

To determine the admissibility of Morales's statement against Cervantes and Martinez, we analyzed, using a de novo standard of review, whether the statement fell within a well-settled hearsay exception or bore sufficient indicia of trustworthiness so as to render it admissible against Cervantes and Martinez. (*Cervantes, supra,* 118 Cal.App.4th at p. 174.)[13] We concluded that Morales's statement implicating his codefendants was trustworthy. The statement was made within 24 hours of the shooting, and Morales made the statement to a longtime friend who treated his injuries. (*Id.* at p. 175.) The statement was disserving of his penal interest and there was nothing in it that rendered him a sympathetic participant in the crime. (See also *Greenberger, supra,*

Roberts was overruled by *Crawford v. Washington* (2004) 541 U.S. 36. *Crawford* held that the Confrontation Clause is violated by the admission of testimonial statement, where the declarant is unavailable and there has not been a prior opportunity for cross-examination. *Crawford* is not implicated in this case, because this case involves a *nontestimonial* statement. We further note that with respect to nontestimonial statements, *Crawford* states, "[I]t is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (*Crawford*, at p. 68.)

[13] *Greenberger* found that a trial court's ruling regarding the trustworthiness of a statement is reviewed for an abuse of discretion. (*Greenberger, supra,* 58 Cal.App.4th at p. 335.) We disagreed with *Greenberger* on this point and applied a de novo review of the totality of the circumstances surrounding the making of the statement. (*Cervantes, supra,* 118 Cal.App.4th at p. 174.) Because we here apply a de novo standard of review, we need not address the trial court's ruling that Butler's statements were admissible as spontaneous statements or under the coconspirator exception.

58 Cal.App.4th at p. 335 [the least reliable circumstance is where the declarant has been arrested and tries to improve his situation by deflecting criminal responsibility onto others; the most reliable circumstance is where the conversation occurs between friends in a noncoercive setting]; *Lilly v. Virginia, supra,* 527 U.S. at pp. 133-134 ["It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.' [Citation.]"].)

Similar indicia of trustworthiness attend the statements Butler made here. First, Butler's statements were against his penal interest. (Evid. Code, § 1230.)[14] Second, the statements were made soon after Jae Yang was murdered, within 24 hours of the crime. Third, Butler made the statements to Robert Arceneaux and in the presence of Letoya Robinson. Both Arceneaux and Robinson were, at a minimum, friendly acquaintances and accomplices in the robbery, to the extent they assisted Butler in casing St. Regis Liquor Store and giving him information about where the cashier kept money. It is not likely that Butler would lie to friends who had some knowledge of the crime and had helped him to commit it. Fourth, Butler's statement did not exonerate him, place him in a sympathetic light or otherwise shift the blame to Peoples. To the contrary, Butler made himself out to be an equal, if not more culpable, participant in the crimes and, moreover, identified himself, not Peoples, as the shooter. Finally, Butler and Peoples are half-brothers. It seems unlikely that Butler would implicate his brother in a crime in which he had no involvement.

---

[14] Evidence Code section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability. . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Based on our independent review, we therefore conclude that Butler's statement was sufficiently trustworthy so that no violation of Peoples' confrontation rights occurred.

II. The admission of criminal disposition evidence against Butler.

During the prosecutor's case-in-chief, he asked Letoya Robinson what Butler said he did to get money. Peoples's counsel objected on the grounds of hearsay, but the objection was overruled. Robinson then testified that Butler said "he sells dope and he robs, hit licks or something like that." Robinson also testified that Peoples similarly said he also sells dope and hits licks. Neither Butler's nor Peoples's defense counsel objected to the admission of this evidence under Evidence Code section 1101. They now contend that their trial counsel rendered ineffective assistance. We find that there is not a reasonable probability that a determination more favorable to defendants would have resulted in the absence of any error.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

We will here assume that defendants established the first prong of an ineffective assistance claim. Evidence Code section 1101[15] prohibits the admission of other crimes evidence for the purpose of showing the defendant's bad character or criminal propensity. Other crimes evidence, however, is admissible against a defendant " 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Like other circumstantial evidence, its admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion. (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369; see also *People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

The People's best argument why this criminal disposition evidence was admissible is it somehow goes to the "res gestae" of the crime or to "tell the story" of the current crime. To support this theory of admissibility, the People cite *People v. Robertson* (1982) 33 Cal.3d 21. The defendant in *Robertson* was on trial for the stabbing murders of two women. Kim P. testified that, a year before the murders at issue, defendant had cut off her clothes with a knife and said he had " 'killed two others.' " (*Id.* at p. 40.) On

---

[15] Evidence Code section 1101 states: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

appeal, defendant argued that his trial counsel should have objected to the evidence under Evidence Code section 1101. The Court of Appeal found that the evidence should have been excluded under Evidence Code section 352, because it was more prejudicial than probative; nonetheless, the error was harmless because the evidence of defendant's guilt was overwhelming.

It is unclear how *Robertson* helps the People's argument, as it has nothing to do with a theory that criminal disposition evidence is admissible to show the "immediate context of the crime, or the 'story' of [the crime]." The *Robertson* court did not discuss that theory of admissibility, and instead focused on Evidence Code section 352 and harmless error. Nor are the other cases, for example, *People v. Marshall* (1964) 226 Cal.App.2d 243, 244-245, that the People cite particularly helpful. In *Marshall* the defendant was charged with the sale of illegal drugs. Evidence of sales a day before and a day after the charged sale to the same undercover police officers was admitted. The court said the evidence was admissible because it served " 'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.' [Citation.] Applicability of this rule seems clear when, as in this case, the other happenings tend directly to show the role of defendant as the sole selling agent in this three-day flurry of narcotics marketing." (*Id.* at p. 245.)

Marshall is clearly distinguishable from the prior disposition evidence admitted here. In *Marshall*, the criminal disposition evidence was really part of the same series of events leading up to and following the charged crime. Here, Robinson testified that Peoples and Butler said they committed robberies (hit licks) to make money. That they made these statements the day before robbing the St. Regis Liquor Store does not make their prior robberies part of the "story" of the St. Regis robbery. The defendants' prior robberies have no connection to the robbery of the St. Regis Liquor Store. Nor was there any evidence about these prior robberies such that a modus operandi or pattern could be established. Rather, it seems to us to be the classic type of criminal disposition evidence that Evidence Code section 1101 prohibits.

That being said, we nonetheless cannot find that defendants have established the second prong of an ineffective assistance of counsel claim. Evidence of defendants' guilt was quite strong, notwithstanding that the identities of the Yang's assailants cannot be established by the video of the murder or by the two eyewitnesses, Alcala and Deiguez. Letoya Robinson testified that the day before Jae Yang's murder she, Arceneaux and defendants discussed the St. Regis Liquor Store and went to the store to case it. Video surveillance taken of St. Regis on December 17, 2004, the day before the robbery and Yang's murder, shows Butler in the store at about 10:00 a.m. He did not buy anything at that time. Robinson testified that she went to the store later that afternoon. Peoples and Butler were also there. Video surveillance confirms her story, and it also shows that although Robinson, Peoples and Butler knew each other, they did not acknowledge each other while in the store. And, as we have discussed above, both Butler and Peoples gave incriminating statements. Butler told Arceneaux that he and Peoples robbed the store and that he, Butler, shot Yang. Peoples told his girlfriend, Candice Hammick, that he was involved in the robbery. Alcala saw a car similar to one associated with defendants parked outside the liquor store moments before the robbery. Butler's former girlfriend was arrested wearing sweat pants similar to sweat pants worn by one of Yang's assailants in the video.

Given this evidence, it is not reasonably probable that a more favorable outcome would have occurred in the absence of the evidence Butler and Peoples had committed prior robberies.

III. Flight instruction.

The trial court gave CALJIC No. 2.52, the flight instruction.[16] Butler's counsel asked that the instruction be limited to Peoples, because there was no evidence that Butler had taken flight. The court did not limit the instruction. Butler now argues that the court's ruling violated his federal constitutional due process rights and right to a fair trial. We find that any error in failing to limit the instruction was harmless. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183.)

During the discussion of the flight instruction, the prosecutor represented that she didn't intend to argue that Butler was subject to the flight instruction. The trial court therefore said: "My inclination would be just to give the standard instruction. And if [the prosecutor] deviates from that, she in any way implicates Mr. Butler on that, then I will give it. Personally, the instruction – at this point, the only person that I can see it might apply to is Mr. Peoples." The court told defense counsel that he could "obviously argue it doesn't apply to your client."

[16] The jury was instructed: "[T]he flight of a person after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

The prosecutor kept her word when giving her closing argument. In her rebuttal argument, she mentioned circumstantial evidence, including "the fact that Kenneth Peoples takes off from the bus depot downtown to Sacramento without anything in his hands and that he's later arrested in Sacramento." The prosecutor thus limited her flight argument to Peoples. She never argued, nor did any of the evidence suggest, that Butler was guilty of flight. It is unlikely that the jury thought the flight instruction applied to Butler, and we therefore conclude that any error in failing to limit the flight instruction to Peoples was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.